SAMA CREDIT & LEASING SDN. BHD.

v.

PEGAWAI PEMEGANG HARTA, MALAYSIA

SUPREME COURT, KUALA LUMPUR
TAN SRI DATO' EDGAR JOSEPH JR. FCJ
DATUK CHONG SIEW FAI FCJ
DATO' WAN ADNAN BIN ISMAIL FCJ
[CIVIL APPEAL NO. 01-4-94]
27 JANUARY 1995

***BANKRUPTCY**: Petitioner obtaining receiving and adjudication orders against debtor - Debtor already declared a bankrupt by another creditor - Official assignee applying to set aside receiving and adjudication orders - Whether s. 8(1) Bankruptcy Act 1967 prohibits the filing of a second petition - Consideration of s. 49(1)(2) of Bankruptcy Act 1967.*

***BANKRUPTCY**: Petitioner obtaining receiving and adjudication orders against debtor - Cause papers served on the official assignee - Official assignee not appearing at hearing - Subsequent application by official assignee to set aside receiving and adjudication orders - Whether proper - Whether official assignee estopped from making the application.*

The respondent/official assignee applied to set aside the receiving and adjudication orders (RO & AO) made against the debtor on the grounds that the debtor had already been declared a bankrupt by another petitioner. The learned High Court Judge stated that s. 8(1) of the Bankruptcy Act 1967 (the Act) prohibited further actions against the debtor without leave of the Court and allowed the application. The appellant/petitioner appealed.

Held:

[1] Section 8(1) of the Act does not prohibit the making of a second and subsequent RO & AO. It merely restricts the remedies against the property or person of the debtor in respect of any debt provable in bankruptcy or the right to proceed with or commence any action or other legal proceeding in respect of such debt "except as directed by this Act" or "with the leave of the Court".

[2] In contrast to s. 8(1) of the Act, which relates only to receiving orders, s. 49(1) & (2) of the Act, render the makings of subsequent RO & AO against an undischarged bankrupt permissible.

[3] The powers to rescind and to annul a RO & AO are discretionary and the principles governing the exercise of the discretion are, broadly speaking, the same. All the relevant facts and circumstances must be considered and where the Court of first instance has exercised its discretion, a strong case would be required to authorise or induce the appellate Court to interfere.

[4] In the circumstances of the present case, including the absence of some of the relevant documents or materials, coupled with the lack of any satisfactory explanation by the official assignee for the failure to advance the situation in the High Court, and on the clear indication that the appellant had acted in good faith without knowledge of the prior existing orders, the official assignee ought not to be allowed to complain of the making of the AO & RO

and to seek their removal on the grounds put forward. This is especially so as the official assignee is also amenable to the law of estoppel.

[Appeal allowed. Receiving Order and Adjudication Order restored].

[**Bahasa Malaysia** Translation of Headnote]

***KEBANKRAPAN** : Pempetisyen memperolehi perintah penghukuman dan perintah penerimaan terhadap penghutang - Penghutang telah diishytiharkan sibankrap oleh pemuitang yang lain - Pegawai pemegang harta memohon untuk mengenepikan perintah penghukuman dan perintah penerimaan - Samada s. 8(1) Akta Kebankrapan 1967 melarang pendaftaran petisyen selanjutnya - Rujukkan kepada s. 49(1)&(2) Akta Kebankrapan 1967.*

***KEBANKRAPAN** : Pempetisyen memperolehi perintah penghukuman dan perintah penerimaan terhadap penghutang - Dokumen guaman disampaikan keatas pegawai pemegang harta - Pegawai pemegang harta tidak hadir untuk perbicaraan - Permohonan selanjutnya oleh pegawai pemegang harta untuk mengenepikan perintah penghukuman dan perintah penerimaan - Samada wajar - Samada pegawai pemegang harta diestop daripada membuat permohonan tersebut.*

Responden/pegawai pemegang harta telah memohon untuk mengenepikan perintah penghukuman dan perintah penerimaan yang dibuat terhadap penghutang atas alasan penghutang tersebut telah diishytiharkan sibankrap oleh pempetisyen yang lain. Hakim Mahkamah Tinggi yang bijaksana telah membenarkan permohonan tersebut dan mengatakan bahawa s. 8(1) Akta Kebankrapan 1967 (Akta tersebut) melarang tindakan selanjutnya terhadap penghutang tanpa kebenaran Mahkamah. Perayu/pempetisyen merayu selanjutnya.

Diputuskan:

[1] Seksyen 8(1) Akta tersebut tidak melarang pemberian perintah penghukuman dan peritah penerimaan yang kedua. Seksyen tersebut cuma menyekat remedi terhadap harta atau persendirian penghutang berhubung dengan sebarang hutang yang boleh dibuktikan dalam kebankrapan atau hak untuk melanjutkan atau memulakan prosiding berhubung dengan hutang tersebut "kecuali diarahkan oleh Akta ini" atau "dengan kebenaran Mahkamah".

[2] Berbanding dengan s. 8(1) Akta tersebut, yang hanya bersangkutan dengan perintah penerimaan, s. 49(1)&(2) Akta tersebut membenarkan pemberian perintah penghukuman dan perintah penerimaan yang selajuntnya terhadap sibankrap.

[3] Kuasa untuk membatalakan perintah penghukuman dan perintah penerimaan adalah kuasa budi bicara dan budi bicara tersebut dilaksanakan atas prinsip yang pada dasarnya adalah sama. Semua fakta-fakta yang relevan dan keadaan sekeliling mesti diambil kira dan dimana Mahkamah perbicaraan telah menggunakan budi-bicaranaya, satu kes yang kukuh diperlukan untuk membolehkan Mahkamah rayuan campur-tangan.

[4] Dalam keadaan kes semasa, termasuk ketidakadaan dokumen-dokumen relevan, dan dengan mengambil kira ketiadaan penjelasan yang munasabah oleh pegawai pemegang harta keatas ketidakhadiran beliau di Mahkamah Tinggi, dan dengan mengambil kira bahawa perayu telah bertindak dengan suci hati dan tanpa pengetahuan perintah-perintah terdahulu, pegawai pemegang harta tidak sepatutnya dibenarkan mengadu atas pemberian perintah penghukuman dan perintah penerimaan dan selanjutnya beliau tidak patut dibenarkan memohon pengenepian perintah-perintah tersebut atas alasan yang dikemukakan. Ini adalah kerana undang-undang estopel juga terpakai kepada pegawai pemegang harta.

[Rayuan dibenarkan. Perintah penghukuman dan perintah penerimaan dipulihkan].

Cases referred to:
Re Roberts, ex parte Watson [1879] 12 Ch. D. 380 CA ***(refd)***
Morgan v. Knight [1864] 33 LJCP 168 ***(refd)***
Re Betts, ex parte Betts [1897] 1 QB 50 CA ***(refd)***
Re Dunn (a Bankrupt), Ex p. Official Receiver v. Dunn [1949] 2 AER 388 CA ***(refd)***
In re a Debtor (No. 446 of 1918) [1920] 1 KB 461 @ 465 ***(refd)***
Re a Debtor (No. 12 of 1970) ex p. the Official Receiver v. The Debtor [1971] 1 AER 504 ***(refd)***
In re Davidson [1894] WN 210 ***(refd)***
In re Carr [1886] 35 WR 150 ***(refd)***
Re a Debtor (No. 994 of 1935) The Debtor v. The Official Receiver [1936] 1 AER 794 ***(refd)***
Ex Parte Ford. In re Caughey [1876] 1 Ch D. 521 ***(refd)***
Meggy v. Imperial Discount Co. [1878] 3 QBD 711 ***(refd)***

Legislation referred to:
Bankruptcy Act 1914, s. 39(1) & (2) [UK]
Bankruptcy Act 1967, ss. 6(3), 8(1), 40(1), (2) & (3), 49(1), (2), 78, 80, 105(1)
Bankruptcy Rules 1969, rr. 17A, 93, 99(3), 136 & 152

For the appellant - K.L. Wong; M/s. K.L. Wong & Lim
For the respondent - Noorin bt Badaruddin, Pegawai Pemegang Harta

JUDGMENT

Chong Siew Fai FCJ:

This is an appeal by the petitioner against the decision of the High Court in Seremban reversing the order of the Senior Assistant Registrar who refused the motion of the official assignee to rescind and annul the receiving order and the adjudication order made against the debtor Tan Beng Liang. The effect of the decision of the High Court was that the receiving order and the adjudication order were set aside. On 3 October 1994 we heard and allowed the appeal with costs to be paid out of the estate of the debtor. The said two orders were restored. Here are our reasons.

The facts are simple. On the petition of the appellant, a receiving order was made and the debtor was adjudged a bankrupt on 27 December 1990. By a notice of motion dated 30 January 1993, the official assignee sought to set aside the receiving order and the adjudication order on the ground that the debtor had already been declared a bankrupt on 9 January 1989 in bankruptcy matter Bil. 26-163-1989 by another petitioner and that the debt of the appellant against the debtor could be proved in bankruptcy bil. 26-163-1989 aforesaid. The learned Judge grounded his decision in that since a receiving order had been made and was in force, no further action could be commenced against the debtor without the leave of Court by virtue of s. 8(1) of the Bankruptcy Act 1967 (hereinafter referred to as "the Act").

Section 8(1), however, deals with the effect of a receiving order (as opposed to an adjudication order), and restricts the remedies against the property or person of the debtor in respect of any debt provable in bankruptcy or the right to proceed with or commence any action or other legal proceeding in respect of such debt "except as directed by this Act" or "with the leave of the Court". The term "debts provable in bankruptcy" is described in s. 40(1),(2) and (3) of the Act which reads as follows:

> 40 (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust shall not be provable in bankruptcy.
>
> (2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the receiving order for any debt or liability contracted by the debtor subsequent to the date of his so having notice.

(3) Save as provided in sub-sections (1) and (2) all debts and liabilities present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order shall be deemed to be debts provable in bankruptcy.

Before us, whilst Counsel for the appellant contended that the appellant's debt in question was not provable, Counsel for the respondent argued otherwise. The materials before us, however, were insufficient for considering the issue.

In contrast to s. 8(1) which, as stated above, relates to a receiving order, s. 49(1) and (2) of the Act, on the other hand, render the makings of subsequent receiving order and adjudication order against an undischarged bankrupt permissible. Section 49(1) and (2) reads as follows:

49 (1) Where a second or subsequent receiving order is made against a bankrupt, or where an order is made for the administration in bankruptcy of the estate of a deceased bankrupt, then for the purposes of any proceedings consequent upon any such order, the official assignee shall be deemed to be a creditor in respect of any unsatisfied balance of the debts provable in the last preceding bankruptcy against the property of the bankrupt in the subsequent bankruptcy.

(2) In the event of a second or subsequent receiving order made against a bankrupt being followed by an order adjudging him bankrupt, or in the event of an order being made for the administering in bankruptcy of the estate of a deceased bankrupt, any property acquired by him since he was last adjudged bankrupt, which at the date when the subsequent petition was presented had not been distributed amongst the creditors in such last preceding bankruptcy, shall (subject to any disposition thereof made by the official assignee in that bankruptcy, without knowledge of the presentation of the subsequent petition) vest in the official assignee on account of the subsequent bankruptcy or administration in bankruptcy as the case may be.

The equivalent of our s. 49(1) and (2) in the English Law is s. 39(1) and (2) of the Bankruptcy Act 1914. It must be noted that even prior to 1914, a second or subsequent adjudication order may, on a creditor's petition be made against an undischarged bankrupt in respect of liabilities incurred after the date of the receiving order in the prior bankruptcy. See *Re Roberts, ex parte Watson* [1879] 12 Ch. D. 380 CA; *Morgan v. Knight* [1864] 33 LJCP 168 though the Court may, in its discretion, refuse to make a further receiving order if it is satisfied that there is no probability of any assets being available for administration under the subsequent bankruptcy. See *Re Betts, ex parte Betts* [1897] 1 QB 50 CA.

The learned Judge also stated that no search had been made by or on behalf of the appellant before presentation of the petition. Past experience had shown (and this was not disputed by Counsel for the official assignee) that there had been instances when the registries or the relevant sections of the official assignee's offices had been unable to advise as to whether a particular debtor had already been adjudged a bankrupt. In any event, the failure to search, *per se*, is not necessarily fatal to the petition but is a factor to consider.

One of the ways a bankruptcy may be disposed of is by annulment. Section 105(1) of the Act provides, *inter alia*, two situations under which annulment may be granted.

(1) where in the opinion of the Court the debtor ought not to have been adjudged bankrupt, or

(2) where the debts are paid in full.

The first situation is relevant in our case. And, in considering whether a receiving order ought to have been made, the appellate Court would consider the actual state of affairs at the date of the order and would, generally speaking, not take into account matters that had occurred after that date. In *Re Dunn (a Bankrupt), Ex p. Official Receiver v. Dunn* [1949] 2 AER 388 CA, Sir Raymond Evershed, MR said:

> I think Counsel for the official receiver is right in saying that, in judging whether the order ought to have been made, the Court is entitled to have regard to the actual state of affairs at the date of the order, which may appear from evidence subsequently filed, and certainly would not appear from the bare statement on the formal Petition which alone was before the Court when the order was made. I do not think, however, that one is entitled, in determining whether the order ought to have been made under the first limb of the subsection to take into account facts which have occurred after the date of the order. (p. 392)

The powers to rescind and to annul a receiving order and an adjudication order are discretionary and the principles governing the exercise of the discretion are, broadly speaking, the same. See *In re a Debtor* (No. 446 of 1918) [1920] 1 KB 461 @ 465 applied in *Re a Debtor* (No. 12 of 1970) *ex p. the Official Receiver v. The Debtor* [1971] 1 AER 504. All the relevant facts and circumstances must be considered. Where the Court of first instance has exercised its discretion, a strong case would be required to authorise or induce the Appellate Court to interfere. See *In re Davidson* [1894] WN 210, *In re Carr* [1886] 35 WR 150, *Re a Debtor (No. 994 of 1935) The Debtor v. The Official Receiver* [1936] 1 AER 794. In this regard, it is unfortunate that in the present case some of the relevant documents were not included in the appeal record, for example, the bankruptcy petition, the notes of proceedings before the Senior Assistant Registrar and the orders made. Be that as it may, it was not disputed that a copy of the bankruptcy petition was served on the official assignee and that neither he nor his representative appeared in Court at the hearing of the petition when the orders were made.

The Bankruptcy Rules 1969 requires the transmission or supplies of documents, receiving and adjudication orders to the official assignee. See, for example, rr. 17A, 93, 99(3), 136, 152. The Bankruptcy Act 1967 requires the official assignee to maintain or keep books and accounts relating to bankruptcy matters. See, for example, ss. 78, 80. Thus, amongst the parties to the petition in our present case, only the official assignee possessed or was equipped with most, if not all, of the relevant papers and information as to whether a receiving order and an adjudication order had previously been made against the debtor as well as the stage of proof of debts at any given time. Steps could have been taken to have the petition dismissed e.g. under s. 6(3) of the Act. However, as stated earlier, at the hearing of the petition in the instant case in which the receiving order and the adjudication order were made, there was no representation in Court on behalf of the official assignee to raise any objection but only to seek their setting aside subsequently on the ground that similar orders had, at the instance of another petitioning creditor, been made nearly two years earlier.

In the above circumstances including the absence of some of the relevant documents or materials, coupled with the lack of any satisfactory explanation for the failure to advance the situation in Court, and on the clear indication that the respondent (petitioner) had acted in good faith without knowledge of the prior existing orders, we considered that the official assignee ought not be allowed to complain of the making of the receiving order and the adjudication order and to seek their removals on the grounds put forward. That the official assignee is amenable to the law of estoppel is beyond question. The case of *Ex Parte Ford. In re Caughey* [1876] 1 Ch D. 521 illustrates that if a trustee in bankruptcy, with the knowledge of the undischarged bankrupt intending to embark upon new business, permitted

or consented to the latter to do so, the trustee would not be entitled in priority to the new creditors to the assets acquired by the undischarged bankrupt in the new business. Of course, the facts in *Ex Parte Ford*, *supra*, are on the converse. There it was found that the trustee had no knowledge nor consented to the bankrupt engaging in the fresh business. Referring to *Ex Parte Ford*, *supra*, Cotton LJ remarked in *Meggy v. Imperial Discount Co.* [1878] 3 QBD 711:

> The doctrine, that knowledge of the dealing by the insolvent with the property left in his charge is essential to deprive the trustee of it, is adopted by Jessel, MR in *Ex Parte Ford.* (p. 721)

Though the two cases relate to the administration of the estates of bankrupts, the underlining principles of estoppel remain relevant. Estoppel applies to the official assignee.

On the materials before us, we were not convinced that the Senior Assistant Registrar was unjustified in refusing the motion. Accordingly we allowed the appeal the appeal and restored the receiving order and the adjudication order.

Reported by Geeta Jothilingam.